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No. 08-139

Supreme Court, U.S.
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In The
Supreme Court of the United States

TERRANCE HAYES, KAISER ALUMINA AND CHEMICAL CORPORATION, AXA GLOBAL RISKS (U.K.), ET AL.,

Petitioners,

v.

THOMAS AND BETTS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal, Fifth Circuit

REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. T&B's inaccurate version of the Statement of the Case purports to insert facts and conclusions that are not in the record 1

II. Petitioners properly raised a substantial federal question in the lower state courts .. 2

III. Petitioners' arguments in their motion for rehearing merely reiterated their claim that they were erroneously denied their right to appeal and did not raise any issue not previously considered by the courts below 9

IV. The actions of the state courts in this case have resulted in the denial of the Petitioners' constitutionally protected right to appeal 10

TABLE OF CONTENTS – Continued

Page

APPENDICES

T&B Engineering Literature ..... App. 1

The Louisiana Supreme Court's denial of Petitioners' writ and Justice Calogero's dissent issued May 2, 2008..... App. 2

The Louisiana Supreme Court's denial of Petitioners' request for rehearing issued June 20, 2008 as reported at *In re Gramercy Explosion at Kaiser*, 2008-0481 (La. 06/20/08), 982 So. 2d 763 ..... App. 5

TABLE OF AUTHORITIES

Page

CASES

Cardinale v. Louisiana, 394 U.S. 437 (1969).....2, 3, 5

Cohen v. Cowles Media Company, 501 U.S. 663 (1991).....6, 7

Dewey v. Des Moines, 173 U.S. 193 (1899).....4, 5

First Nat'l Bank of Ruston v. Lagrone, 164 La. 907, 114 So. 832 (La. 1972).....2

Griffin v. Illinois, 351 U.S. 12 (1956).....2

Hill v. California, 401 U.S. 797 (1971).....5

Illinois v. Gates, 462 U.S. 213 (1983).....4

Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938).....8

Junot v. Morgan, 2002-0237 (La. App. 1 Cir. 02/05/02), 818 So. 2d 152 .....10, 11

McKane v. Durston, 153 U.S. 684 (1894).....2

Old Jordan Mining & Mining Co. v. Societe Anoyme Des Mines, 164 U.S. 261 (1896).....5

Pool v. Gaudin, 207 La. 403, 21 So. 2d 424 (La. 1945).....2

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945).....9, 10

State ex rel. Durand v. Parish Judge, 30 La. Ann. 282 (La. 1878).....2

Succession of Damico, 109 So. 2d 402 (La. 1925).....2

TABLE OF AUTHORITIES – Continued

Page

Succession of Tullier, 216 La. 821 (La. 1950) 2

Tolis v. Board of Supervisors of Louisiana State University, 95-1529 (La. 10/16/95), 660 So. 2d 1206 10

United States v. Williams, 504 U.S. 36 (1992).....5

CONSTITUTION

U.S. Const. amend. V 7

U.S. Const. amend. XIV 7

STATUTES

La. Const. art. VII §§ 29, 48 (1921).....2

La. Code Civ. Pro. Ann. art. 2082 (2008) 2

28 U.S.C. § 1257(a) 2

ARGUMENT

Petitioners Terrance Hayes ("Hayes"), Kaiser Alumina and Chemical Corporation, and Kaiser's property insurers ("Kaiser/AXA") respectfully provide this Honorable Court with a Reply Brief in response to Thomas & Betts Corporation's ("T&B") Brief in Opposition to Petitioners' Writ of Certiorari to address the issue of this Court's jurisdiction over the case in question.

I. T&B's inaccurate version of the Statement of the Case purports to insert facts and conclusions that are not in the record.

T&B failed to follow Supreme Court rules in its statement of fact. Contrary to T&B's assertions, no jury form asked the jury to decide whether Kaiser had failed to properly maintain or use its own equipment. Therefore, there is no evidence that the jury's verdict was based on such a conclusion. Contrary to T&B's assertion, Kaiser did properly run and maintain its equipment, and T&B's product was used as exactly as indicated by T&B's own engineering literature. App. 1. We do not and cannot know why the jurors exonerated T&B but found the electrician and engineer who used the T&B product liable. T&B failed to follow Supreme Court rules by drawing its own erroneous and, with respect to the issues presented by this writ application, irrelevant, conclusions from the jury's verdict in this matter.

II. Petitioners properly raised a substantial federal question in the lower state courts.

T&B argues that this Court lacks jurisdiction to entertain Petitioners' Due Process and Equal Protection arguments because Petitioners allegedly failed to timely raise these arguments in the Louisiana Supreme Court in accordance with 28 U.S.C. § 1257(a) and *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). T&B's arguments fail to address the real issue – whether Petitioners were denied their right to appeal. Petitioners acknowledged in their recent writ application that while this Court has long held that there is no "right" to appeal explicitly enumerated in the United States Constitution, where a state provides a process of appellate review, the state's procedures must comport with the constitutional guarantees of due process and equal protection. *See McKane v. Durston*, 153 U.S. 684 (1894), *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Louisiana guarantees the process of appellate review through its constitution, statutes, and case law.[1] Federal Constitutional law guarantees protection of those rights.

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[1] *Succession of Damico*, 109 So. 2d 402 (La. 1925), *citing* La. Const. art. VII §§ 29, 48 (1921), *Succession of Tullier*, 216 La. 821, 824 (La. 1950), *citing State ex rel. Durand v. Parish Judge*, 30 La. Ann. 282 (La. 1878), *First Nat'l Bank of Ruston v. Lagrone*, 164 La. 907, 114 So. 832 (La. 1972), *Pool v. Gaudin*, 207 La. 403, 21 So. 2d 424 (La. 1945, La. Code Civ. Pro. Ann. art. 2082 (2008).

T&B relies on *Cardinale* for its proposition that this Court may only grant writ to review a judgment of a state's highest court if the petitioner has properly raised and preserved a substantial federal constitutional issue in state court. 394 U.S. at 438. T&B alleges that the right to appeal, which is guaranteed to litigants by the state of Louisiana, is not protected by the United States Constitution. *Cardinale* does not apply to this case because it and its progeny present different legal issues. *Cardinale* and the cases that followed it involved petitioners who attempted to raise federal questions and new theories on appeal that were not previously raised in state court. *Id.*

In *Cardinale*, the petitioner was convicted of murdering a woman after having confessed upon his arrest. *Id.* at 437. The petitioner did not contend on appeal that his confession was involuntary or was not an admission of guilt. *Id.* at 438. In his writ application to this Court, the petitioner raised, for the first time, a challenge to the constitutionality of a state statute that required confessions to be admitted in their entirety, and argued that parts of his confession were irrelevant and prejudicial. *Id.* No state statute's constitutionality is being challenged herein for the first time on appeal. Petitioners, in the courts below and now in this Court, have consistently maintained that the failure of Louisiana's highest court to follow its own state statutes and prior jurisprudence constitute a violation of their right to appeal, which is by definition due process, and these rights are guaranteed

by the constitutions of both the United States and Louisiana.

In *Illinois v. Gates*, this Court noted that it would not allow new federal questions to be raised for the first time on certiorari to the United States Supreme Court, but acknowledged that assignments of error can be enlarged and considered in conjunction with arguments raised below:

> [W]e have recognized that it often may be unclear whether the particular federal question presented in this Court was raised or passed on below. In *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899), the fullest treatment of the subject, the Court said that "[if] the question were *only an enlargement of the one mentioned in the assignment of errors*, or if it *were so connected with it in substance as to form* but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question of law to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed."

462 U.S. 213, 220 (1983) (emphasis added). The *Gates* Court further noted, "[w]e have not attempted, and likely would not have been able, to draw a clear-cut line between cases involving only an "enlargement" of questions presented below and those involving entirely new questions." *Gates*, 462 U.S. at 220. In the

present case, Petitioners simply enlarged their arguments below regarding their right to appeal by reminding the Louisiana Supreme Court of the constitutional implications of their denial of writs in this matter, which ultimately denied Petitioners' right to appeal. There is no new argument in this matter that Petitioners have urged before this Court that they did not urge in the state courts below. Thus, this matter is distinguishable from cases such as *Cardinale*, where this Court has barred arguments *not previously raised* in state courts. *Compare Hill v. California*, 401 U.S. 797 (1971) (barring petitioner's argument that search and seizure of his diary that admitted his participation in the robbery violated his Fifth Amendment rights because he had not raised it below in state courts), *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899) (barring petitioner's argument that the assessment amounted to a taking because the petitioner failed to raise this argument in conjunction with his argument that his due process rights were violated when he did not receive personal notice of assessment proceedings).

To determine whether a federal question was considered, this Court uses the "not pressed or passed upon below" rule. *United States v. Williams*, 504 U.S. 36 (1992). The failure of a party to present an error assigned to the court below constitutes an abandonment or waiver of all errors not assigned. *Old Jordan Mining & Mining Co. v. Societe Anoyme Des Mines*, 164 U.S. 261, 264 (1896).

The present case is not even marginally subject to the "not pressed or passed upon" below rule. The arguments pursued at the state level and with this Court are the same – whether Petitioners have been denied their right to appeal. Petitioners briefed the violation of their right to appeal in both the state intermediate court and the Louisiana Supreme Court every time a brief was filed. When the Louisiana Fifth Circuit Court of Appeal dismissed Petitioners' appeal on the basis of res judicata, it merely ignored its prior dismissal on the basis of prematurity and its instruction to the parties to cure the defect by having the trial court enter judgment incorporating the jury verdict as the JNOV had vacated the prior judgment that incorporated the jury verdict. T&B glosses over this prior dismissal on the grounds of prematurity, stating that the instruction to obtain a judgment from the trial court is *obiter dicta* and "language unnecessary to its decision." Opp. to Pet. 5.

This Court held in *Cohen v. Cowles Media Company* that "[i]t is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal law issue that the state supreme court actually considered and decided." 501 U.S. 663, 667 (1991). Cohen sued a Minnesota newspaper for breach of contract after it revealed him as a source, despite the newspaper's promises of confidentiality. *Id.* The newspaper defended itself on its right to free speech. *Id.* The lower court awarded Cohen damages and the state supreme court reversed and held that Cohen's breach of contract action was inappropriate, and

questioned whether Cohen could recover under a promissory estoppel theory that was never tried to a jury, or briefed or argued on appeal. *Cohen*, 501 U.S. at 667. This Court reversed, holding that "[t]he initial question we face is whether a private cause of action for promissory estoppel involves 'state action' within the meaning of the Fourteenth Amendment such that the protections of the First Amendment are triggered." *Id.* In the present case, the issue before this Court is whether the denial of Petitioners' right to appeal constitutes "state action" within the meaning of the Fourteenth Amendment such that the protections of the Fifth and Fourteenth Amendments are triggered. U.S. Const. amend. V, XIV. Petitioners were not deprived of their constitutionally protected right to appeal until the Louisiana Supreme Court denied writs. At that point, the only procedural vehicle available to argue that Petitioners were denied their right to appeal was an application for rehearing directed to the court that had denied it. This is why the Petitioners first briefed the federal constitutional implications of the Louisiana Supreme Court's actions in an application for rehearing to that court. Chief Justice Calogero recognized the implication of the majority's opinion, and wrote a separate dissent to enumerate his concerns regarding Petitioners' right to appeal. App. 3-4. Justice Calogero wrote that he would have granted the writ: "I would come down on the side of allowing the appeal at this juncture, if for no other reason than it seems no appellate court has yet examined the merits of the jury verdict." App. 3. Justice Calogero would have granted the rehearing as well. App. 5.

No court may turn a blind eye to the United States Constitution. In *Indiana ex rel. Anderson v. Brand*, a public school teacher sought a writ of mandate to compel a school to enforce the terms of her contract, which had incorporated the terms of the Teachers' Tenure Act. 303 U.S. 95, 96-97 (1938). The Teachers' Tenure Act provided tenure to teachers who had served for five or more consecutive years. *Id.* at 97. The school demurred that the Teachers' Tenure Act had been repealed, which the lower court sustained, holding that the repeal did not deprive the teacher of a vested property right and did not impair her contract within the meaning of the constitution. *Id.* at 97-98. This Court held that it had jurisdiction to consider the case, despite the lower courts' decision that was based on an independent, non-federal ground. *Id.* at 98.

> On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the state has, by later legislation, impaired its obligations.

Id. at 100.

III. Petitioners' arguments in their motion for rehearing merely reiterated their claim that they were erroneously denied their right to appeal, and did not raise any issue not previously considered by the courts below.

T&B argues that rehearing was not a permissible vehicle for Petitioners to raise its arguments of due process and equal protection with regard to their right to appeal the reinstated jury verdict. To this end, T&B relied on *Radio Station WOW, Inc. v. Johnson* for the proposition that the Petitioners' due process argument could not serve as a basis for review by this Court when not raised in the state supreme court until in a petition for rehearing. 326 U.S. 120, 128 (1945). *Radio Station WOW* is an extremely convoluted case involving a radio station license and transfer of a radio station lease, and the power of the Federal Communications Commission to regulate that license and transfer. *Id.* at 121. The parties were embroiled in litigation that questioned the power of a state court to adjudicate this claim, which appeared to fall under the exclusive jurisdiction of the Federal Communication Commission, but this issue of whether the state court ever had jurisdiction to initially hear the matter was not raised until rehearing to the state supreme court. *Id.* at 128.

In the present case, the Louisiana Supreme Court clearly had jurisdiction to entertain this suit. Furthermore, as briefed for the Court above, there is no new question or issue raised in Petitioners' motion

for rehearing, which merely expressed Petitioners' claim to right of appeal is also protected by constitutional guarantees of due process and equal protection. Therefore, *Radio Station WOW* is not a proper analogy to the present case.

IV. The actions of the state courts in this case have resulted in the denial of the Petitioners' constitutionally protected right to appeal.

The action of Louisiana's Supreme Court has resulted in denial of Petitioners' constitutionally protected right to appeal. T&B erroneously relies on *Tolis v. Board of Supervisors of Louisiana State University* for the proposition that the final judgment of the Louisiana Fifth Circuit, which reversed the trial court's judgment notwithstanding the verdict and reinstated the jury's verdict, operates as a final judgment that reached the merits of the case and operated as res judicata to bar any future litigation in this matter. Opp. to Pet. 11, 95-1529 (La. 10/16/95), 660 So. 2d 1206. The crux of this issue is whether the reversal of the JNOV operates as a final judgment on the merits of a jury decision that had never been appealed. Petitioners note that T&B failed to address the implications of *Junot v. Morgan*, which ruled that an appealing party could not seek review of both a jury's verdict and a JNOV, because the JNOV vacated and *replaced* the jury's verdict. 2002-0237 (La. App. 1 Cir. 02/05/02), 818 So. 2d 152, 156-57. Chief Justice Calogero's dissent indicated that *Junot* would favor the case being remanded to the district court to enter

a judgment pursuant to the jury's verdict and permit further proceedings, including an appeal. App. 3-4. Petitioners further supported this argument with jurisprudence from other jurisdictions that embraced a rule similar to *Junot*. The applicable cases and statutes, none of which were discussed by T&B in its opposition, all favor a remand back to the trial court to permit further proceedings, including Petitioners' appeal. Petitioners respectfully request that this Honorable Court intervene to enforce Petitioners' constitutional safeguards, and to protect and preserve their right to appeal.

Respectfully submitted,

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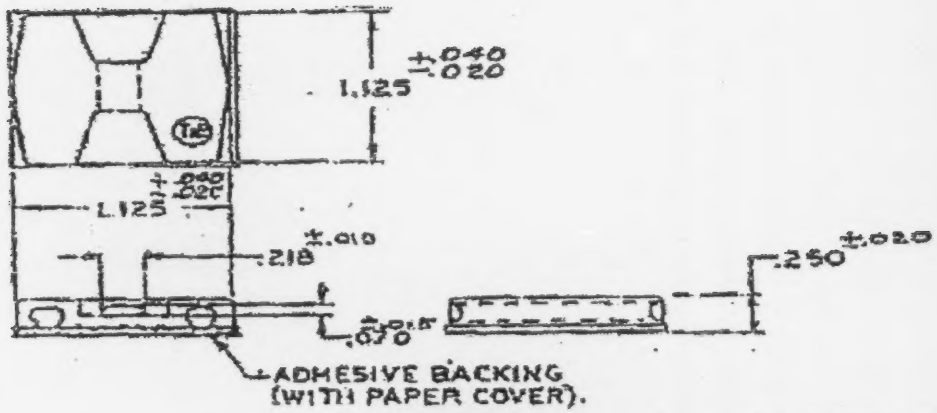
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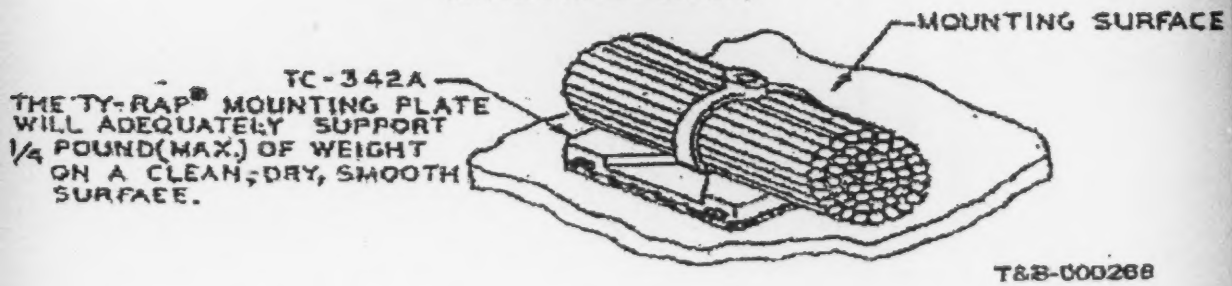
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The Supreme Court of the State of Louisiana

IN RE GRAMERCY PLANT EXPLOSION AT KAISER

NO. 2008-CC-0481

IN RE: Q.B.E. International Insurance Ltd.; Swiss Reinsurance Company; Zurich Reinsurance Company; Houston Casualty Company; Munich Reinsurance Company; Qatar Insurance Company; AXA Global Risks (U.K.) et al.; Sorema Insurance Company; Winterthur International Insurance Company; Certain Underwriters at Lloyd's London; Lexington Insurance Company; Kaiser Alumina & Chemical Corporation; Hayes, Terrance; National Union Fire Insurance Company; Compagnie Transcontinentale De Reassurance; Allianz Insurance Company; – Plaintiff(s); Applying for Supervisory and/or Remedial Writs, Parish of St. James, 23rd Judicial District Court Div. D, Nos. 25,975; to the Court of Appeal, Fifth Circuit, No. 07-C-893

May 2, 2008

Denied.

JTK

CDK

BJJ

JPV

CDT

JLW

CALOGERO, C.J., would grant and assigns reasons.

Supreme Court of Louisiana
May 2, 2008

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

No. 2008-CC-0481

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

ON APPLICATION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FIFTH CIRCUIT, PARISH OF ST. JAMES

MAY 2 2008

[/s/ [illegible]] **CALOGERO, Chief Justice, would grant and assigns reasons.**

While the law appears not to be entirely clear on when an appeal on the merits may be taken after a JNOV and new trial are granted, but those rulings are later reversed and the jury verdict reinstated by the court of appeal, I would come down on the side of allowing the appeal at this juncture, if for no other reason than it seems no appellate court has yet examined the merits of the jury verdict. Furthermore, the cases that come close to addressing the issue either tend to support the applicants' position or are

inconclusive. *Junot v. Morgan*, 01-0237 (La. App. 1 Cir. 2/5/02), 818 So.2d 152, would favor the case being remanded to the district court to enter a judgment pursuant to the jury verdict and to permit further proceedings, including an appeal therefrom. And this court in *Vasalle v. Wal-Mart Stores, Inc.*, 01-0462 (La. 11/28/01), 801 So.2d 331, after reversing the JNOV and new trial order, simply reinstated the jury verdict, without any instruction to the district court; therefore, this court in *Vasalle* did not address whether an appeal on the merits might lie from the reinstated jury verdict.

The Supreme Court of the State of Louisiana

IN RE GRAMERCY PLANT EXPLOSION
AT KAISER

NO. 2008-CC-0481

IN RE: Hayes, Terrance, Kaiser Alumina & Chemical Corporation, AXA Global Risks (U.K.) et al; – Plaintiff(s); Applying for Reconsideration of this Courts order dated May 2, 2008; Parish of St. James, 23rd Judicial District Court Div. D, Nos. 25,975; to the Court of Appeal, Fifth Circuit, No. 07-C-893

June 20, 2008

Reconsideration denied.

BJJ

CDK

JPV

CDT

JTK

JLW

CALOGERO, Chief Judge, would grant.

Supreme Court of Louisiana

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court